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E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-955

JOHN C. CRIM, a/k/a BOB MILLER,
Petitioner,

vs.

THE STATE OF INDIANA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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JOHN C. CRIM, a/k/a BOB MILLER,
Petitioner,

vs.

THE STATE OF INDIANA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA.

To the Honorable the Supreme Court of the United States:

Your Petitioner, John C. Crim, respectfully prays that a writ of certiorari issue to review and reverse the judgment of the Supreme Court of Indiana, entered in this cause on August 12, 1971, as to which a timely-filed Petition for Rehearing was denied on October 29, 1971.

In support of his petition, Petitioner represents as follows:

I.

OPINION BELOW.

The opinion of the Supreme Court of Indiana is unofficially reported in the National Reporter System at 272 N. E. 2d 85. It is not yet officially reported. A verbatim

copy of the opinion and a complete copy of the Order of the Supreme Court of Indiana denying Petitioner's timely-filed Petition for Rehearing are reproduced in the Appendix to this Petition.

II.

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under Title 28, United States Code, § 1257(3) and Rule 19(a) of the Rules of this Court, to review a decision of the Supreme Court of Indiana as to a federal question of substance, decided by that Court in a way not in accord with applicable decisions of this Court.

A. Date of Judgment Sought To Be Reviewed.

The Judgment of the Supreme Court of Indiana was entered on August 12, 1971.

B. Order on Petition for Rehearing.

Petitioner timely-filed his Petition for Rehearing, that is, within twenty (20) days after August 12, 1971; the Supreme Court of Indiana denied rehearing on October 29, 1971.

III.

QUESTION PRESENTED FOR REVIEW.

Where law enforcement officers make a warrantless probable-cause arrest and as a part of a warrantless probable-cause personal search of the arrestee's body discover and seize all the evidence they had probable cause to believe was in his possession, does a subsequent warrantless search of the arrestee's impounded motor vehicle constitute an unreasonable search, making the incriminating evidence seized from the motor vehicle subject to the Fourth Amendment exclusionary rule?

IV.

CONSTITUTIONAL PROVISIONS INVOLVED.

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

The Fourteenth Amendment to the Constitution of the United States provides in relevant part as follows (Section 1):

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law. . . .

V.

A CONCISE STATEMENT OF THE CASE.

The case originated in the Pulaski Circuit Court, Pulaski County, Indiana, where Petitioner was charged with the crime of theft of certain hogs on or about August 3 or 4, 1967. The venue of the case was moved on Petitioner's Motion to the Starke Circuit Court, Starke County, Indiana, where it was tried to a jury which, on September 25, 1968 returned its verdict against Petitioner, finding him guilty of the crime as charged.

After pre-sentence investigation as in such cases required by the law of the State of Indiana, Petitioner was on October 11, 1968 sentenced to an indeterminate 1 to 10 year term in the Indiana State Prison.

Within the times and by the procedures required by applicable Indiana law, Petitioner filed his Motion for a New Trial; after this Motion was denied, Petitioner perfected a regular appeal to the Supreme Court of Indiana which affirmed the judgment of the Trial Court on August 12, 1971. Petitioner's Petition for Rehearing was denied on October 29, 1971.

The issue Petitioner urges here was first raised in the Starke Circuit Court by his Motion to Suppress, seeking an order suppressing the evidence seized during and following the search of which he here complains. After hearing, the Trial Court denied the Motion to Suppress.

Petitioner renewed and preserved his contention at all stages throughout the trial and the appeal to the Supreme Court of Indiana, first, by in-trial motions challenging the admissibility of the disputed evidence; then by collecting in his Motion for a New Trial all his contentions of error on the ultimate issue and on the Trial Court rulings on the procedural steps taken to preserve the question; and, finally, by presenting these claimed errors to the Supreme Court of Indiana by way of his Assignment of Errors and by argument of these issues in his brief on appeal.

The federal questions presented here were first raised in the Trial Court by Petitioner's Motion to Suppress. Omitting the formal parts, that Motion reads as follows (Record, p. 25, line 11 to p. 26, line 20):

> JOHN C. CRIM, being first duly sworn upon his oath, says:
>
> 1. That he is the defendant in the above entitled cause and that he was charged by way of affidavit with the crime of theft on August 9, 1967.
>
> 2. That on the 8th day of August, 1967, your affiant was arrested by two police officers of the Kosciusko County Sheriff's Department; that your affiant was then taken into custody without warrant.

3. That at the time affiant was arrested by said police officers of the Kosciusko County Sheriff's Department, without the consent of affiant and against his will, a search of the affiant and the vehicle owned by affiant which he was then and there operating was conducted by said police officers of the Kosciusko County Sheriff's Department.

4. That at the time your affiant was arrested by the aforesaid police officer, he was not engaged in the commission of a felony nor did any probable cause exist to believe that he had committed a felony or was about to commit a felony; that at the time your affiant was arrested, he was not engaged in the commission of a misdemeanor in the presence of the aforesaid police officers; that said search was not incidental to a lawful arrest; that said arrest was unlawful.

5. That as a result of said search, certain articles were taken from the person of your affiant and certain articles were removed from the affiant's vehicle.

6. Affiant further alleges that said arrest and said search were in violation of his constitutional rights under Article I, Section 11 of the Constitution of the State of Indiana, and said arrest and search were also in violation of the Fourth Amendment to the Constitution of the United States.

WHEREFORE, Affiant prays that the articles obtained by said aforesaid police officers as a result of the unlawful search and seizure of affiant and the unlawful arrest of your affiant be suppressed and rejected and that the State be barred from introducing the same into evidence upon the trial of this cause, and that the State be further barred from introducing any testimonial evidence relative to these articles or relative to the search, seizure and arrest of your affiant.

A verbatim transcript of the hearing held on the Motion to Suppress will be found in the Record at p. 79, line 7 to p. 169, line 26. A summary of the evidentiary record on which the Trial Court based its ruling is as follows:

Petitioner's counsel called as witnesses in support of the Motion to Suppress and Reject Evidence certain police officers and the manager of the livestock sale barn where the stolen hogs were sold. The State of Indiana called a police officer and two farmers, the owner of the hogs and his father.

In substance, the evidence given at the hearing on the Motion to Suppress established that sometime during the night of August 4, 1967, forty-seven hogs were stolen from the farm of Everett Larry Miller, Jr., in the southern part of Pulaski County, Indiana. No one saw the theft in process, nor was any identifying evidence found at the scene.

Certain hogs, later identified by the owner of the stolen hogs as his, were delivered to the Claypool Sales Barn at Silver Lake, Indiana (in Kosciusko County) during the night. Pursuant to the usual custom, the person delivering the hogs tacked up a hand-printed small sign on the pen into which the hogs were placed, identifying the consignor of the hogs as one "Bob Miller."

The owner of the hogs had alerted the Pulaski County Sheriff of their theft and he in turn had advised law enforcement officers in surrounding counties. The owner's father visited the Claypool Sales Barn and, suspecting that certain hogs found there were his son's recently stolen hogs, so advised his son who ultimately went to the Claypool Sales Barn and identified the hogs as his.

Various police procedures were followed, including what is called a "stakeout" and the Claypool Sales Barn personnel were enlisted as aides in the investigation.

Among other things, the sales barn personnel observed that two men appeared, asking whether, as was the regular custom, the "Bob Miller hogs had sold," and were advised that they had not and that the callers would have to return

at a later time in order to receive the check realized upon the sale of the hogs. At all these times, the personnel of the sales barn were acting in cooperation with the police department.

On the morning of August 8, 1967, a person who was not identified appeared at the sales barn and, upon asking for the check for the Bob Miller hogs, was given the sales barn's check in the sum of $747.57, payable to "Bob Miller," and also was given what later was identified in the record as a "purchase memorandum," being a one page detail of the transaction.

These two items were received in evidence at the trial, collectively identified as State's Exhibit 1 (apparently because they were stapled together when obtained by the police). These were obtained from Petitioner's boot as a result of a custodial "skin search," apparently carried out for inventory purposes.

After the check and the purchase memorandum were received, the individual accepting them left the Claypool Sales Barn's premises in a red and white Ford pickup truck. One of the sales barn's yard personnel copied its license number. Another of the sales barn's personnel followed the truck.

After the truck and the following sales barn's employee had departed, law enforcement officers arrived and were informed of that morning's developments. They left in pursuit of the truck. En route they encountered the sales barn's employee who had been following it and, when he gave them instructions as to the road and direction in which it was moving, the law enforcement officers proceeded to overtake it.

Flashing their revolving lights, the officers forced it to a stop and, without so advising him in any particular phrases or by the use of the word "arrest," they arrested Peti-

tioner and ordered him into their patrol car. The pickup truck was moved by one of the arresting officers to the Kosciusko County jail at Warsaw, Indiana, as was Petitioner.

At the Kosciusko County jail, as noted, Petitioner was "skin searched," and the two exhibits referred to above were taken from his person. At all these times his pickup truck was impounded in the custody of the Kosciusko County Sheriff's Department. Although obviously under arrest, Petitioner was not at this point given any oral statement to that effect.

Unknown to him, a pre-printed form of traffic citation (called in Indiana a "Uniform Traffic Ticket") was made out against him and placed in the property drawer assigned for his personal effects, charging him with a violation of an obscure Indiana motor vehicle regulation prohibiting "obstructed license plates," a charge apparently based upon a fanciful pretext invented by the arresting officers and having a surface plausibility due to the design of Petitioner's pickup truck, on which the heavy back bumper rests slightly above the lower rim of the single license plate.

While Petitioner was in his cell, and at various times throughout the day, the law enforcement officers searched his pickup truck and, among other things, found the "booklet of blank bank checks" the introduction of which into evidence gives rise to Petitioner's Fourth Amendment claims here.

The undisputed evidence both at the hearing on the Motion to Suppress and Reject Evidence and at the trial was that the arresting officers did not have an arrest warrant at any time prior to or following their taking Petitioner into custody. They did not seek or obtain at any time any kind or type of search warrant.

The Trial Court ruled that all physical evidence taken from the person of the Petitioner as well as that seized upon search of his pickup truck was admissible for Fourth Amendment purposes (although some items, not here in issue, were rejected on other grounds).

Petitioner does not here challenge the admission into evidence of State's Exhibit 1, being the two articles (check and purchase memorandum) taken from his person as a result of a skin search. His challenge is limited to the admission into evidence of the checkbook taken in a warrantless search of his pickup truck.

Note: Petitioner alerts the Court to a glaring record defect, apparently overlooked by his state-court appellate counsel at the time of preparing the Petition for Rehearing. The Supreme Court of Indiana lightly dismissed Petitioner's Fourth Amendment questions on the grounds of a hybrid "mootness-harmless error" rule. The scope of that ruling does not, however, reach the evidentiary article—described as a "booklet of blank bank checks"—the admission of which raises the sole issue Petitioner asserts in this Court; for it appears that the Supreme Court of Indiana plainly misread the record when it stated at page 2 of its opinion (Appendix, p. ____):

> The booklet of blank checks was never offered in evidence, and thus no question is presented with respect to it.

This is an incurably erroneous statement—incurable because there is no procedure in Indiana appellate practice for a subsequent Petition for Rehearing nor sufficient time within which to fashion a procedural device for this occasion and adhere to the time limits governing the filing of this Petition; and erroneous because the exhibit, identified as Defendant's Exhibit No. 3 on hearing on Motion to Suppress (Record, p. 119), was re-designated as State's

Exhibit No. 8 and admitted in evidence at the trial (Record, p. 283, line 20 to p. 284, line 7):

> "MR. TANKERSLEY: The State now tenders into evidence State's Exhibit Number 8.
>
> MR. FRANCESCHINI: Same objection before made.
>
> THE COURT: Show it over-ruled and admitted into evidence.
>
> MR. TANKERSLEY: I would like to display it to the jury.
>
> MR. FRANCESCHINI: And for the further objection there is no evidence that this is the property of the defendant.
>
> THE COURT: Over-ruled.
>
> (Whereupon State's Exhibit Number 8 for identification was received in evidence and exhibited to the jury.)
>
> REPORTER'S NOTE: For State's Exhibit 8, please see Defendant's Exhibit 3 on hearing on Motion to Suppress and Reject Evidence."

In one sense, then, the precise issue Petitioner asserts here has not been treated by the Supreme Court of Indiana. It may be a reasonable inference that that Court's "mootness-harmless error" rule would have been applied to the admission of the illegally seized check book; but, if so, its decision would fail to distinguish between warrantless probable cause searches of an arrestee's person and warrantless searches of impounded motor vehicles; and this would present an additional federal question of substance: deprivation of federally-protected rights of constitutional dimension by application of a harmless error standard substantially less rigorous than the federal standard, which is that the error must be harmless beyond a reasonable doubt.

Given the procedural void that exists and the relentless time limits that obtain, Petitioner presents his reasons for

allowance of the Writ under the belief that, even if it had not misconceived the Record, the Supreme Court of Indiana would have decided the Fourth Amendment issue he argues in a manner not in accord with applicable decisions of this Court.

The issue was preserved for appeal by the following specification in Petitioner's Motion for a New Trial (Record, p. 72, lines 10 to 17):

> Comes now the defendant in the above entitled cause and moves the court for a new trial thereof upon the following grounds and for the following reasons:
>
> 1. Irregularities in the proceeding of the court and orders of the court by which the defendant was prevented from having a fair trial in this, to-wit:
>
> (a) The court erred in overruling the defendant's Motion to Suppress and Reject Evidence.

The issue was further preserved for appeal by inclusion in Petitioner's Assignment of Errors, which reads as follows (Record, p. 1, lines 9 to 15):

> The Appellant avers that there is manifest error in the judgment and proceedings in this cause which is prejudicial to Appellant in this:
>
> 1. The court erred in overruling Appellant's Motion for a New Trial.
>
> 2. The court erred in overruling Appellant's Motion to Suppress and Reject Evidence.

For the foregoing reasons, Petitioner respectfully submits that the federal questions presented here were timely and properly raised at all requisite stages of the proceedings below so as to give to this Court the jurisdiction required by Rule 23 to review the judgment on a Writ of Certiorari.

VI.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

Petitioner asserts that the rulings of the Trial Court, affirmed by the Supreme Court of Indiana, treat the Fourth Amendment issue in a way not in accord with applicable decisions of this Court, as enunciated in the following cases:

Wolf v. *Colorado* (1949), 338 U. S. 25;
Mapp v. *Ohio* (1961), 367 U. S. 643;
Ker v. *California* (1963), 374 U. S. 23;
Chimel v. *California* (1969), 395 U. S. 752;
Preston v. *United States* (1964), 376 U. S. 364;
Chambers v. *Maroney* (1970), 399 U. S. 42.

Petitioner respectfully submits that a synthesis of the teaching of the cited cases, most of which are collected and discussed in the latest Fourth Amendment case emanating from this Court, *Coolidge* v. *New Hampshire* (1971), 401 U. S. ___, 91 S. Ct. 2022, sets up the following rules governing warrantless searches of motor vehicles: such searches may lawfully be conducted if but only if one of the following three conditions obtain: (a) the search is incident to a lawful arrest; (b) there is at the time of the search probable cause to make it and it either is impracticable or superfluous to obtain a warrant; and (c) such a search may be made where there are additional exigent circumstances justifying it.

It is undisputed in this Record that the search of Petitioner's pickup truck was without warrant. It was conducted (at the Kosciusko County Sheriff's office) after Petitioner was in custody and outside the truck, thus at a time and place absolutely depriving Petitioner of any opportunity to seize a weapon or destroy any evidence.

No object was in plain view, particularly the checkbook introduced in evidence over Petitioner's objection.

After Petitioner was in custody and locked up in the Kosciusko County jail, his pickup truck was in the custody and possession of law enforcement officials at all critical times. There was nothing about the circumstances that would have made it either impracticable or superfluous to obtain a warrant calling for the search of the pickup truck, particularizing with reasonable specificity the articles if any that the law enforcement agents then had probable cause to believe would be uncovered by such search.

Consistently since *Preston* v. *United States* (1964), 376 U. S. 364, "[o]nce an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." Any question concerning the validity of Petitioner's arrest aside, it simply cannot have been a part of the state court rulings that the search of his pickup truck was incident to that arrest.

Although it is not in any sense clear in the record, Petitioner concedes for present purposes that he was arrested on the highway (without a warrant) because the arresting officer thought he had been involved in what has been called in the record the theft of the "Bob Miller hogs," or, at least, in an attempt to dispose of the hogs after their theft. Petitioner does not here argue the validity of his arrest, as it apparently was never challenged either in the Trial Court or in the Supreme Court of Indiana. Since, therefore, the arrest was without warrant, it follows that is was made purely on the basis of probable cause for arrest.

As Petitioner reads this Court's Fourth Amendment cases, it manifestly does not follow that there was implicit within the probable cause justifying the arrest probable

cause for a search of his pickup truck, especially in the circumstances disclosed in this record, where the search was conducted after Petitioner was safely in custody and when more than ample time was available in which the searching and seizing officers could have applied for and obtained a specific search warrant from a neutral and detached magistrate.

The crux of Petitioner's Fourth Amendment argument is that the undisputed facts of this case are distinguishable in principle from those which bottomed this Court's opinion in *Chambers* v. *Maroney* (1970), 399 U. S. 42. This calls for brief evaluation of the facts and information known to the arresting officers not only at the time of the arrest, but, more crucially, at the time of the search of Petitioner's pickup truck.

Petitioner has conceded that in pursuing his pickup truck from the sale barn the arresting officers had probable cause to believe that he had received at the sale barn a check made payable to one "Bob Miller," amply identified as the person who had made claim to the proceeds realized upon the sale of hogs reasonably regarded by the arresting officers as having been stolen. Before they left the sale barn in pursuit of Petitioner's pickup truck, the officers who ultimately effected his arrest had absolutely no knowledge or information suggesting that he had stolen the hogs. They did possess information from which they reasonably could have inferred that Petitioner was implicated in that theft, but only to the extent of collecting the proceeds of the sale, either for himself, if he in fact was the person who stole the hogs, or in behalf of the actual thieves.

Analytical clarity may be aided by reflecting upon what result rationally would have followed upon the trial if the evidence arrayed against this Petitioner were limited

to that obtained from his person as a result of a "skin search" at the Kosciusko County jail. This would have yielded the check received on the day of the arrest from the sale barn (the receipt of which by Petitioner was already known to and formed a part of the probable cause relied on by the arresting officers) and what is described as a "purchase memorandum," being the accounting vehicle supporting issuance of the check. Without the subsequent warrantless search of his pickup truck, the booklet of blank bank checks would not, under the hypothetical circumstances offered for purposes of illustration, have been received in evidence.

It is manifest that, with the evidence thus limited, Petitioner could not and would not have been convicted of the crime of theft of the hogs. At best, he might have been convicted of some class of complicity or, depending upon whatever additional hypothetical assumptions are employed, conspiracy to commit the crime of theft. This observation at once gives the lie to the confident dismissal of Petitioner's Fourth Amendment arguments by the Supreme Court of Indiana, a ruling resting on the lame grounds that receipt in evidence of the illegally searched out and seized booklet of blank bank checks was "harmless" or rendered "moot." Of course it may be true at the same time that the Supreme Court of Indiana would not have treated the issue so cavalierly had it not simply erred in its review of the record and found that the challenged exhibit was not received in evidence when, as noted, it obviously was.

Thus the critical distinction between these facts and those at issue in *Chambers* v. *Maroney:* having obtained as a result of their "skin search" of Petitioner's body all the evidence they had any probable cause to believe that either Petitioner or his vehicle contained, there simply was no evidence or contraband to be discovered by a search

of Petitioner's pickup truck that could, without the intervention of a warrant, be hinged to the total circumstances of the probable cause the officers had for any search. Stated differently, had the officers not found either the check or the purchase slip, both of which they had probable cause to believe were in Petitioner's possession at the time they conducted a skin search, then there would [illegible] sufficient probable cause to support a reasonable search of the truck and such time as those articles turned up. That search, if valid, could have been made at the [illegible] scene, or at some [illegible] time after the [illegible] was impounded. [illegible] was immediately after the vehicle was impounded [illegible] can be made at the [illegible] time of [illegible] search.

the Fourth Amendment's proscription of unreasonable searches, but also reauthenticates the limiting proposition that such searches can be no *fishing*.

The challenged search was, of course, conducted on August 9, 1957. It is therefore pre-*Chimel*, *Chambers* and *Coolidge*. If those authorities are not retrospectively applied—and it is noted that they do pre-date the decision by the Supreme Court of Indiana—then those Fourth Amendment [illegible] upon *Preston v. United States* (1964), 376 U. S. 364; *Ker v. California* (1963), 374 U. S. 23 and the pre-[illegible] *United States* (1925), 267 U. S. 132.

[illegible] that there is nothing [illegible] that is not explicit in the cases [illegible] to the issue of the challenged search. *Preston* [illegible] a search of the kind in issue here; and, as [illegible] the individual option in [illegible] the *Preston* [illegible] expressly did not [illegible] from others to preclude the *Preston* [illegible] impossible to [illegible] that "evi[illegible] automobile"; but [illegible] of time and place that de[illegible] automobile as incident to a [illegible] that it was superseded by [illegible] exigent circum[illegible] search warrant [illegible]

[illegible] that the war[illegible] does not satisfy any of [illegible] Fourth Amendment [illegible] It clearly could not have [illegible] arrest. It could not have [illegible] the crime, for the officers already had [illegible] of evidence they had any probable

cause to believe were connected to the Petitioner. And, as Petitioner was incarcerated at the time of the search and his pickup truck was impounded, there could have been no exigent circumstances jusfifying the search.

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari issue to review the final judgment of the Supreme Court of the State of Indiana entered on August 12, 1971, and adhered to on October 29, 1974, and that upon review said judgment be reversed and this cause be remanded to the Supreme Court of Indiana with instructions that it reverse the judgment of the Starke Circuit Court and grant Petitioner's Motion for a New Trial.

Respectfully submitted,

JOHN C. CRIM,

Petitioner.

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APPENDIX.

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In the Supreme Court of Indiana.

John C. Crim, a/k/a Bob Miller,
Appellant,
vs.
State of Indiana,
Appellee.
No. 369 S 42.

APPEAL FROM THE STARKE CIRCUIT COURT.

Honorable Marvin D. McLaughlin, *Judge.*

Prentice, *J.*

Defendant (Appellant) was convicted of the crime of theft. The errors assigned on this appeal relate to the overruling of the trial court of his motion to suppress certain evidence obtained from the person and vehicle of Defendant shortly after his arrest. The arrest was made without benefit of a warrant. It is the contention of the defendant that there was no probable cause for the arrest and no warrant to search the vehicle, which there was not, and that consequently the evidence sought to be suppressed was inadmissible, having been obtained in violation of Article

I, § 11 of the Constitution of Indiana and the Fourth Amendment to the Constitution of the United States.

The evidence in question consisted of a negotiable bank check, a purchase memorandum and a booklet of blank bank checks. The first two items had been taken from the person of the defendant at the time he was searched and jailed. The last mentioned item had been taken from its concealed position behind the back of the seat of the defendant's vehicle, which he was driving at the time of his arrest. The only probative value of these items was to identify the defendant as the person who presented himself to the sales barn manager on August 8th as Bob Miller and asked for and received payment for the Bob Miller hogs.

The hogs had been stolen from their owner in Pulaski County during the night or early morning of August 3rd and 4th, 1967 and left unattended and unreceipted for in a pen at Claypool Sales Barn, in Kosciusko County, sometime between 6:30 p.m. on August 3rd and 8:00 a.m. on August 4th. State's Exhibit 2, a card with the name "Bob Miller" printed thereon, was found on the pen by the sales barn employee at the time he discovered the hogs.

The booklet of blank checks was never offered in evidence, and thus no question is presented with respect to it.

We have reviewed the evidence adduced at the hearing on the motion to suppress, and while we are of the opinion that it supported a valid arrest and search, in the interest of conserving time and effort we will not here relate it. The defendant was identified at the trial by personnel of the sales barn as the same person who had sold livestock through the sales barn on two previous occasions and who had appeared on August 8th and asked for and accepted a check in payment for the Bob Miller hogs. This evidence was uncontroverted. The evidence sought to be suppressed,

therefore, was merely cumulative, and the propriety of the arrest and search rendered moot.

The admission of improper evidence which tends only to disclose a fact which is clearly proved by other legitimate and uncontroverted evidence is harmless error.

Davis v. *State* (1968), 251 Ind. 133, 239 N. E. 2d 601;

Peterson v. *State* (1968), 250 Ind. 269, 234 N. E. 2d 488;

Jackson v. *State* (1967), 248 Ind. 579, 228 N. E. 2d 2;

Adams v. *State* (1946), 224 Ind. 472, 69 N. E. 2d 2].

JUDGMENT AFFIRMED.

ARTERBURN, C. J. and GIVAN, DEBRULER and HUNTER, *JJ.* Concur.

IN THE SUPREME COURT OF INDIANA.

JOHN C. CRIM, a/k/a BOB MILLER,
Defendant-Appellant,
vs.
STATE OF INDIANA,
Plaintiff-Appellee.

No. 369 S 42

APPEAL FROM THE STARKE CIRCUIT COURT.
Honorable MARVIN D. MCLAUGHLIN, *Judge.*

PETITION FOR REHEARING.

Defendant-Appellant would respectfully show to the Court:

1. That he was convicted of the crime of theft in the Starke Circuit Court on September 25, 1968. That thereafter he prayed an appeal to this Court, which affirmed the judgment of conviction on August 12, 1971. That pending said appeal defendant-appellant has been at liberty on bond.

2. That by reason thereof this Court has jurisdiction to consider defendant-appellant's Petition for Rehearing.

3. Defendant-appellant asserts that the opinion above referred to contravenes Article 7, § 5, of the Indiana Constitution in the following particulars:

A. That the opinion of this Court fails to give a statement in writing of a substantial question arising on the record, in particular, the facts surrounding petitioner's arrest in Fulton County by the Sheriff of Kosciusko County for a misdemeanor observed by said Sheriff committed in Fulton County. Evidence of this fact was given by the Sheriff of Kosciusko County, which appears at Tr. pp. 91-

139 (defendant-appellant's Appeal Brief pp. 4-5). This Court stated on this question, "We have reviewed the evidence adduced at the hearing on the motion to suppress, and while we are of the opinion that it supported a valid arrest and search, in the interest of conserving time and effort we will not here relate it". That such fact was the basis for petitioner's motion to suppress and reject evidence, the overruling of which was the main basis of petitioner's appeal. The opinion of the Court fails to discuss the authority of a County Sheriff to make an arrest without a warrant based on the facts as revealed in the record as alleged in the foregoing paragraph.

B. The authority of a County Sheriff to make an arrest without warrant, thus, establishing a firm guideline from the Bar and the Courts to follow.

C. The opinion of this Court fails to discuss the legal effect of the failure of the Sheriff when making the arrest to inform defendant-appellant the reason therefore, which failure by the arresting officer contravenes a ruling precedent of this Court. (Plummer v. State, 135 Ind. 308, 34 N. E. 968 (1893).

4. The opinion of this Court in stating, "Evidence sought to be suppressed, therefore, was merely cumulative, and the propriety of the arrest and search rendered moot", is erroneous for the reason that this Court thereby is attempting to determine what evidence convinced the jury of the guilt of the defendant-appellant beyond a reasonable doubt, in contravention of ruling precedent of this Court.

Reid v. *State*, ... Ind. ..... 1967, 231 N. E. 2d 808;

Brodcrick v. *State*, Ind. 1967, 231 N. E. 2d 526, certiorari denied 89 S. Ct. 164, 393 U. S. 872, 21 L. Ed. 2d 141;

Hardesty v. *State*, Ind. 1967, 231 N. E. 2d 510.

5. The Court in its opinion failed to discuss the statutory powers of the Sheriff and based on the facts revealed by the record herein has invaded the legislative powers granted by the Indiana Constitution to the General Assembly as expressed in Article 4, § 22(1), and Article 3, § 1, in that the opinion of this Court does not discuss the jurisdiction and legislative authority of a County Sheriff to arrest for a misdemeanor beyond the confines of his bailiwick.

WHEREFORE, petitioner prays that he be granted a rehearing in a reconsideration of his appeal.

/s/ CARL M. FRANCESCHINI,
Carl M. Franceschini,
Attorney for Defendant-Appellant.

Petition for Rehearing is hereby denied this 29th day of October, 1971.

/s/ DONALD H. HUNTER,
Donald H. Hunter,
Acting Chief Justice.

Supreme Court, U.S.
F I L E D
FEB 18 1972
CLERK

IN THE

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OCTOBER TERM, 1971

NO. 71-955

JOHN C. CRIM, a/k/a a BOB MILLER,
Petitioner,

-vs-

THE STATE OF INDIANA
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Petitioner's conviction of the crime of theft resulted from evidence obtained through an illegal search and seizure.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is substantially correct. Certain corrections

and additions to the recitation of the facts of the case are necessary, though.

Petitioner alleges (Petition for Writ, p. 8) that the search of the pickup truck occurred after the search of the person. The record shows that the two searches overlapped in time so as to be in part simultaneous. Deputy Sheriff Carlin testified that at the beginning of the booking process he left the room in which that activity was taking place and that he was at the truck while they were completing the booking. (R. 131, 132).

The other aspect to be considered here is the identification of Petitioner as the "Bob Miller" whose name was given as owner of the stolen livestock. The animals were left at a sales barn during the night. There was no testimony as to who left them except

that a notice was left showing them to be consigned for sale by one "Bob Miller". Petitioner was identified as the man who represented himself as "Bob Miller" on several occasions to recieve checks for the sale of the livestock stolen in this case and in earlier sales of livestock. (R. 155, 213 -229). It might be noted though, that the bulk of this evidence came in the trial proper rather than the hearing on the Motion to Suppress.

ARGUMENT

PETITIONER'S CONVICTION DID NOT RESULT FROM AN ILLEGAL SEARCH AND SEIZURE

Petitioner's claim will be here considered from several aspects. It is first necessary to state specifically the claim Petitioner is now stating in this Court.

The validity of the arrest is not disputed. The legality of the search of Petitioner's person and the admissibility of the evidence obtained in that search is not disputed. It is not disputed that the search of the vehicle at the jail has the same validity, if made upon probable cause, as an immediate search at the place of the arrest. No issue other than the search of the vehicle is raised. The only issue is whether the deputy sheriffs had probable cause to search the vehicle for evidence which might help establish Petitioner's guilt.

That specific issue, as opposed to a general issue of searches and seizures, is presented for the first time in this Court. The Motion to Suppress filed in the trial court alleged the searches of the person and vehicle

to be unlawful on the grounds that Petitioner's arrest was unlawful. (R. 25-26). Petitioner's brief to the Indiana Supreme Court was also based on this issue of a search pursuant to an unlawful arrest. That brief failed to refer even once to the checkbook which is the evidence now alleged to have tainted the conviction. This Court has stated that it will not consider claims which are raised for the first time in this Court. Cardinale v. Louisiana, 394 U.S. 437 (1969).

Even were Petitioner's claim properly before the Court, the conviction is valid. The conviction can be upheld on the ground that the search was valid or on the ground that, if there were error, that error was harmless.

This Court stated in Chambers v. Maroney, 399 U.S. 42 (1970) that a warrantless search

of a vehicle being operated by a suspect at the time of his arrest is valid, if made with probable cause, whether the search is made immediately at the place of arrest or later at a police station or jail. The officers in this case did have probable cause for a search of the vehicle. They had been informed that Petitioner had just presented himself at the sales barn as "Bob Miller" and recieved a check for the stolen livestock. This information was sufficient basis for belief that Petitioner was one of the thieves. There was testimony at the trial showing that the particular pickup truck involved here might have been used in the theft. (R. 196-198, 200-202).

Petitioner argues that the only evidence that there could be any probable cause to believe existed was the check and sales memorandum

just received at the sales barn, because there was no probable cause to believe that Petitioner had been involved in the theft itself. As already shown, the belief which the officers could reasonably have went beyond that. Petitioner's approach draws an unreasonably fine line in distinguishing what is or is is not reasonable to believe.

Accepting for purposes of argument that the search could only properly be aimed at the two items noted above, the record will still support the validity of the search. The allegation that the search of the person totally preceded the search of the vehicle is contrary to the facts shown by the record. As shown in the Statement of The Case, supra, the two searches appear to have been at least partially simultaneous.

Nor would it have been necessary to delay the search of the vehicle until the completion of the search of the person. It is the teaching of Chambers v. Maroney, supra, that the search can be carried out as soon after the impounding of the vehicle as desired.

Alternatively, any error in the search of the vehicle would be harmless. Chapman v. California, 386 U.S. 18 (1967). The only evidence complained of was an unused checkbook in the name of "Bob Miller". (R. 119). The only use of such evidence was to indicate that Petitioner did use the alias (assuming the checkbook to be his property.) There was ample evidence of identification of Petitioner as "Bob Miller" through the testimony of the witness Edwin M. Bontrager that Petitioner had used that alias on a number

of occasions in selling livestock. (R. 213-229). And it might even be submitted that the mere identification of Petitioner as the man who represented himself as "Bob Miller" on the one occasion which led to his arrest would have been sufficient to uphold a conviction. Petitioner's argument that the checkbook was vital to the State's case is simply illogical. If an indication of the importance of the piece of evidence is to be given, that checkbook would more likely be the least important evidence than to be crucial to the State's case.

CONCLUSION

For these reasons, the Petition For Writ of Certiorari should be denied.

Respectfully submitted,

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Deputy Attorney General

Attorneys for Respondent